

Five Questions on Brexit to LAURENT PECH

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Laurent Pech , Maximilian Steinbeis So 26 Jun 2016

1. *What were your thoughts when you first heard of the result of the referendum?*

I first heard of the result after waking up at 2.30am to check the preliminary results in a number of constituencies. I had previously read that if Remain were not clearly ahead by then it would mean a victory for Leave. I must say I expected a narrow victory for Remain and was therefore fairly surprised by the outcome considering what most polls had predicted shortly before the vote. I immediately started cogitating about the legal problems that would follow from the vote.

1. *Could an exit of the UK result in changes to the constitutional setup of the European Union, for better or worse?*

This is a rather difficult question to answer in a few words. I personally do not expect any change to the present constitutional arrangements of the EU. If anything, the 'British question' will occupy EU policy-makers for the foreseeable future and I see no appetite whatsoever for Treaty change. What we might see instead is radical changes to the constitutional setup of the UK.

1. *What does the referendum teach us about the merits and limits of direct democracy?*

There is ample scholarship on the limits if not perils of direct democracy when citizens are asked to decide complex policy choices in the absence of a clear understanding of the available options and potential consequences of their vote. I worked in Ireland at the time of the Lisbon 1 and 2 referenda and I clearly remember a study, published post Lisbon 1, which showed that a significant proportion of the electorate who voted against the Lisbon Treaty were not apparently able to answer four basic questions about the EU such as whether Switzerland was a member. I have since read that following today's result, many people based in the UK have been using Google to ask 'what is the EU'.

This confirms a concern on the limits of direct democracy, which is premised on a well-informed and engaged electorate. A number of studies have shown a critical lack of awareness and comprehension among the UK electorate concerning not only how the EU works, but also more basic facts such as the number of EU workers in the UK or the amount of the UK contribution to the EU budget. I would not however blame UK voters, as they are exposed to a number of media outlets, which are not necessarily acting in accordance with the ethics of journalism when reporting EU-related news. As for the Leave campaign, it is difficult to disagree with my colleague Professor Michael Dougan when he described their contribution to the debate as 'dishonesty on an industrial scale'. There is ample evidence of this; for instance, the Leave campaign argued that the UK had no veto over any eventual Turkish accession to the EU, which as a matter of law is factually wrong.

1. *Do you think the decision for Brexit could be reversible?*

This is the million pound question, I dare say. What is crystal clear is that the referendum is not legally binding on the Parliament as a matter of British constitutional law. In other words, the referendum result was of an advisory nature only. The British Parliament could have decided that the result would be binding, but it purposefully declined to do so when it adopted the EU Referendum Act 2015. As long as Article 50 TEU is not triggered, we cannot exclude a situation in which a majority of the current MPs decide that new economic and/or political circumstances warrant a second referendum or there is a snap General Election leading to the victory of a pro-Remain party. While this is less legally clear, the British government might also be able to trigger Article 50 TEU and change its mind before the withdrawal agreement is concluded. Article 50 TEU has never been triggered before, and so there is no precedent for this situation.

1. *Do you see a way to keep Scotland and Northern Ireland within the European Union?*

It is difficult to answer this question concisely so let me just say that one cannot exclude Scotland to retain UK membership of the EU should the UK formally trigger Article 50 TEU and Scotland vote for independence before a withdrawal agreement is concluded. More realistically, an independent Scotland might be able to join the EEA as an interim step before eventually joining the EU. With respect to Northern Ireland, the legal and political framework is even more complex than in the case of Scotland, and I would rather not speculate on this part of the question, in the event of being quickly proven wrong now that Pandora's box has been opened.

Questions by Maximilian Steinbeis

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